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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Amana Refrigeration, Inc. (hereinafter referred to as "Amana") prays that a Writ of Certiorari issue to review the judgment entered on October 20, 1959 by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported, sub. nom. *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, in 271 F. 2d 257 (Adv. Sheet No. 2, December 14, 1959) and is printed in its entirety in Appendix "A" hereto. The order of the District Court dismissing Amana's "First Cause of Action" (the claim based on an alleged violation of the Robinson-Patman Act), as

well as its order directing the entry of final judgment as to such order of dismissal, is printed in its entirety in the Appendix (attached to Amana's Brief) filed by Amana in the Court of Appeals, nine additional copies of which have been filed with this Petition pursuant to Rule 21(4) of the Rules of this Court.

JURISDICTIONAL GROUNDS

The judgment order of the Court of Appeals, printed in Appendix "B" hereto, was entered on October 20, 1959. A timely petition for rehearing was filed by Amana, and an order denying said petition, printed in Appendix "C" hereto, was entered on November 24, 1959. The jurisdiction of this Court is invoked under Title 28 U.S.C., § 1254 (1) and under Title 28 U.S.C., § 1651.

QUESTIONS PRESENTED

1. Does the absence of an affirmative showing that an appeal from a Rule 54(b) order involves an "infrequent harsh case" justify the dismissal of the appeal on the ground that the district court abused its discretion in entering the Rule 54(b) order?

2. Is Section 2(a) of the Robinson-Patman Act applicable to discrimination in the sale of television time by the television networks?

STATUTE AND RULE INVOLVED

The statute and rule involved on this appeal are Rule 54(b) of the Federal Rules of Civil Procedure and Section 2(a) of the Robinson-Patman Act, Title 15 U.S.C. § 13(a), 49 Stat. 1526 (1936).

Section 2(a) of the Robinson-Patman Act is printed in its entirety in Appendix "D" hereto.

Rule 54(b) of the Federal Rules of Civil Procedure reads as follows:

> "(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT OF THE CASE

This suit was brought by Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") against Amana to recover damages for an alleged breach of certain agreements between Amana and CBS relating to Amana's sponsorship of "The Phil Silvers Show" over the CBS television network. At the time of answering the CBS complaint, Amana filed a counterclaim (Court of Appeals Appendix, pp. 8-14) alleging three claims under the Federal anti-trust laws, such claims being designated, respectively, as the First, Second and Third "Cause of Action." CBS filed a reply to both the Second and Third Causes of Action which allege certain "tying" practices on the part of CBS violative of both Section 1 of the Sherman Act and Section 3 of the Clayton Act. These two claims are still before the District Court, no pre-trial discovery or other

proceedings having been had as yet with respect to such claims.

The First Cause of Action of Amana's counterclaim is based on an alleged violation of Section 2(a) of the Robinson-Patman Act. Its basic allegations may be paraphrased as follows: (1) Pursuant to a CBS form agreement, Amana purchased television time from CBS for the purpose of sponsoring "The Phil Silvers Show" over the CBS network; (2) at or about the time of Amana's sponsorship of "The Phil Silvers Show", certain competitors of Amana also purchased television time from CBS for the purpose of sponsoring programs over the CBS network; (3) the network television time purchased by both Amana and such competitors was "prime" or evening time, designated by CBS, for purposes of determining its sales price, as "Class A" time; (4) such competitors of Amana were charged substantially less for such television time than Amana; (5) as a result of such discrimination, competition in the business engaged in by Amana and such competitors was substantially lessened, and the competition between Amana and such competitors was injured; and (6) as a further result of such discrimination, Amana was injured in its business and suffered substantial damages.

CBS filed a motion to dismiss this First Cause of Action on the ground that it failed to state a claim upon which relief could be granted. Upon a consideration of the briefs filed by the parties in connection with that motion, the District Court entered an order (Court of Appeals Appendix, p. 26-27) dismissing Amana's claim on the ground that television time is not a "commodity" as that term is used in the Robinson-Patman Act.

Subsequently, the District Court, having expressly determined *after an examination of the briefs of both parties*

on the Rule 54(b) issue that there was no just reason to delay the appeal of Amana's First Cause of Action, entered a "certification" order (Court of Appeals Appendix, pp. 28-29) directing that final judgment be entered as to such dismissal. It was from that order that the appeal was taken. After the appeal was docketed, CBS filed a motion to dismiss the appeal on the ground that the District Court improperly entered the Rule 54(b) order. After briefs limited to this procedural question had been filed by both parties, the Court of Appeals ordered that the CBS motion to dismiss the appeal be continued and taken with the case on its merits.

After hearing the appeal on its merits—extensive briefs on the "commodity" question having been filed by both parties—the Court of Appeals, without discussing the merits, dismissed the appeal because of an asserted lack of appellate jurisdiction. While the Rule 54(b) issue primarily argued by both parties was whether the lawsuit involved but a single claim (as CBS contended) or whether (as Amana contended) the First Cause of Action of the counterclaim—the Robinson-Patman Act claim—was an independent "claim for relief" (Chief Judge Hastings in his dissent specifically found Amana's First Cause of Action to be a separate claim for relief), the decision of the Court of Appeals was predicated solely on the holding that the District Court *abused its discretion* in certifying that there was "no just reason for delay" in entering its appealable order. Having thus dismissed the appeal, the Court of Appeals remanded the cause to the District Court with directions to vacate its order entered under Rule 54(b).

The mandate of the Court of Appeals has been stayed pending Amana's application for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE SEARS, ROEBUCK CASE.

The definitive interpretation of amended Rule 54(b) was laid down by this Court in *Sears, Roebuck and Co.* v. *Mackey*, 351 U.S. 427, 76 S. Ct. 895 (1956). The complaint involved in the *Sears, Roebuck* case was divided into four counts, the first two of which were dismissed by the district court. Count I of the complaint was based on a violation of the Sherman Act and rested in part on some of the same facts that were involved in counts III and IV, the latter two counts alleging unfair competition claims which remained unadjudicated at the time of the district court's certification order. The defendant-appellee filed a motion to dismiss the appeal for lack of appellate jurisdiction, and the Court of Appeals for the Seventh Circuit, speaking through Judge Duffy (then Chief Judge), upheld its jurisdiction (218 F. 2d 205 (1955)). This Court affirmed, and its opinion provided the much-needed clarification of the law under Rule 54(b), both as to what constitutes a separate "claim for relief",[1] and, what is more important for purposes of this Petition, the standard that should be applied in judging the propriety of a district court's exercise of discretion in "dispatching" a claim for immediate appeal.

By describing the only available ground for such a motion to dismiss for lack of appellate jurisdiction, this Court

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1. It appears as though the Second Circuit has declined to follow the *Sears, Roebuck* "basis of liability" test with respect to what constitutes a separate "claim for relief" under Rule 54(b); see *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (1957); *Schwartz* v. *Eaton*, 264 F. 2d 195 (1959); and *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp.*, 267 F. 2d 178 (1959).

set forth the requirements for a proper "certification" order under Rule 54(b):

> "The grounds for such a motion ordinarily might be (1) that the judgment of the District Court was not a decision upon a 'claim for relief', (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order." (351 U.S. at 436.)

In the following paragraph of its opinion, this Court answered each of these contentions and held that all of the requirements for a proper Rule 54(b) order had been met in that case. As to the first two requirements, this Court held:

> "In the case before us, there is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims." (Ibid.)

The following two sentences of the opinion take up the third requirement, that relating to the propriety of a district court's exercise of discretion. This Court's holding on that point *should have been controlling as to the instant case:*

> "Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other." (Ibid.; emphasis by this Court.)

There is a direct conflict between the standard thus established in the *Sears, Roebuck* case and the standard applied

by the Court of Appeals in the instant case. After quoting at length from *Panichella* v. *Pennsylvania Railroad Co.*, 252 F. 2d 452 (3rd. Cir. 1958)—a case inapposite because it involved a *contingent* third-party claim—the Court below evaluated the instant case by the standard applied in the *Panichella* case, i.e., the "infrequent harsh case" rule. Stating that the appeal would delay the trial of the principal claim—a statement which is clearly shown to be erroneous by Chief Judge Hastings in his dissent—the Court below simply held:

> "The instant case presents no hardship of unfairness which would justify discretionary departure from the normal rule as to the time of appeal." (271 F. 2d at 259.)

The conflict of this decision with the *Sears, Roebuck* decision is twofold. First, the standard applied by this Court was solely in terms of the "inherent separability" of the claims involved in the case, while the standard adopted by the Court below was solely in terms of the "infrequent harsh case". The factors of "infrequency" or "harshness" were not even mentioned by this Court in *Sears, Roebuck*, and, conversely, the Court below, in dismissing the appeal, completely disregarded the inherent separability of Amana's claims.

The second conflict between the decision of the Court below and the *Sears, Roebuck* decision is related to the first and is, perhaps, even more important from the standpoint of proper appellate procedure. This second conflict has to do with the approach of an appellate court to an asserted abuse of discretion by a lower court. The approach taken by this Court in *Sears, Roebuck* is consistent with the well established principle that an appellate court, in reviewing a discretionary act, cannot merely substitute its consid-

ered judgment for that of the lower court, but may reverse only if the lower court's action was so arbitrary as to constitute an *abuse* of its discretion.[2]

In contrast to this Court's viewpoint as to the proper scope of review of a district court's discretionary Rule 54(b) order (the question of *power* of review is not involved here), the Court below is apparently of the opinion that its scope of review of such orders is unlimited. The standard adopted by the Court below embodies what amounts to a presumption of an improper exercise of discretion *unless* there is an affirmative showing that the district court's discretion was *not* abused. The adoption of such a standard not only conflicts with the principle of *narrow* scope of review as to a lower court's discretionary orders, but, more particularly, is in conflict with the precise language of Rule 54(b). The Rule requires a determination that "there exists no just reason for delay," and such a determination is far different from that apparently required by the Court below, i.e., that there exists an extraordinary reason *not* to delay.

That the Court below approaches Rule 54(b) appeals with what is tantamount to a presumption of invalidity is corroborated by *Gass* v. *National Container Corp.*, 271 F. 2d 231 (7th. Cir. 1959), a case decided by the Seventh Circuit ten days after the case at bar. The opinions in both cases contain the same lengthy quotations from the Third

2. The operation of Rule 54(b) must be carefully distinguished from the operation of the recently-enacted interlocutory appeals statute (28 U.S.C. §1292(b)). Under Rule 54(b) procedure (where the appeal is taken pursuant to 28 U.S.C. §1291) a court of appeals *must* review the case, assuming that the other two requirements of Rule 54(b) are met, *unless* it determines that the district court has abused its discretion, while under Section 1292(b) procedure the court of appeals *may, in the exercise of its own discretion*, accept the appeal or decline to review the case. This distinction is pointed up *In Re Heddendorf*, 263 F.2d 887 (1st Cir. 1959).

Circuit's *Panichella* case. (It is interesting to note that in a later case, *Simmonds Accessories v. Elastic Stop Nut Corporation*, 257 F. 2d 485 (1958), the Third Circuit did not even refer to the "infrequent harsh case" rule and upheld its appellate jurisdiction even though the claims involved in the case were factually identical.) The sole basis for the Court's holding of abuse of discretion in the *Gass* case is as follows:

> "Application of the above standard to the instant case clearly indicates that it was not an appropriate one for entering a special order under Rule 54(b). There is nothing which establishes the existence of any hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal." (271 F. 2d at 233.)

From the opinions in the instant case and the *Gass* case viewed together significantly, the Rule 54(b) issue was not raised in the *Gass* case in any brief or motion nor was there any discussion of the issue on oral argument—it is clear that the Court below has, in effect, adopted a presumption of invalidity as to all Rule 54(b) appeals. The *Gass* opinion contains no basis for the holding of an abuse of discretion other than an *absence* of an *affirmative* showing of hardship. And the only positive basis for the Court's holding in the instant case was its finding that the appeal would delay the trial of the principal claim, a finding which had no supportable basis in fact. In net effect, the Court below merely substituted its judgment for that of the District Court, despite the fact that the District Court carefully examined the briefs of both parties before granting Amana's motion for a certification order. We submit that such an approach to the review of a district court's exercise of discretion in entering a Rule 54(b) order is in direct conflict with the view of this Court expressed in *Sears, Roebuck*.

As an additional reason for granting the Writ, a review of the decision of the Court below is important because it is in conflict with the Federal policy regarding piecemeal appeals. This is so because the Court's decision virtually assures a second appeal *on precisely the same legal question* that is involved in Amana's First Cause of Action. This second appeal will be taken after Amana's second and third causes of action have been disposed of in the District Court. If Amana is successful on this second appeal, the case will then have to be remanded for a trial on Amana's First Cause of Action, for the essential evidence in support of the First Cause of Action will be irrelevant and thus inadmissible at the trial of Amana's two other claims, and, by the same token, the essential evidence in support of Amana's other two claims will not be relevant to the First Cause of Action.[3] After this second trial on Amana's First Cause of Action, there remains the probability of a *third appeal* by the party that is defeated with respect to that claim. The *hardship* inherent in this prospect of three appeals and two trials could have been—and can be if this Court grants this Petition—reduced to a maximum of two appeals and one trial simply by the *disposition* of the appeal which has been fully briefed and argued before the Court below. To do so, we submit, would have been in full accord with, *and in furtherance of*, the well-established Federal policy regarding piecemeal appeals. And, as stated by Chief Judge Hastings in his dissent (271 F. 2d at 201):

[3] For example, proof of injury to competition under Amana's First Cause of Action—the price discrimination claim—involves evidence as to the competition between Amana and its competitors, while the necessary proof of injury to competition under Amana's second and third causes of action—the two "tying contract" claims under the Sherman and Clayton Acts—involves evidence relating to competition among television station owners, on the one hand, and competition among television program producers, on the other hand.

"To do so is to give effect to the plain import of the holding in Sears, Roebuck Co. v. Mackey, supra."

II. THE WRIT SHOULD BE GRANTED BECAUSE THE QUESTION OF WHETHER TELEVISION TIME IS A "COMMODITY" FOR PURPOSES OF THE CLAYTON AND ROBINSON-PATMAN ACTS IS AN IMPORTANT QUESTION UNDER THE FEDERAL ANTI-TRUST LAWS THAT SHOULD BE DECIDED BY THIS COURT.[4]

The illegality of price discrimination in the form of quantity discounts has for some time been settled law. That such discrimination, being inescapably injurious, is violative of the Robinson-Patman Act was established by this Court in *F.T.C. v. Morton Salt Company*, 334 U.S. 37, 68 S. Ct. 822 (1948).

CBS, as well as the other major television networks, has engaged for many years in such a quantity discount practice, and Amana, as one of the sponsors of "The Phil Silvers Show", was one of the victims of this discrimination. In answer to Amana's claim for damages, the primary

4. While the Court below did not decide this question, even though it was fully briefed and argued before it, the precedents clearly demonstrate that this Court may properly do so in the interests of expedition:

> "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period." (*Cole* v. *Ralph*, 252 U.S. 286 at 290, 40 S. Ct. 321 at 324 (1920).)

See also *Storey Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248 (1931) and *Ecker* v. *Western Pac. R. R. Corp.*, 318 U.S. 448, 63 S. Ct. 692 (1943).

contention of CBS is that its pricing system, although discriminatory, is nevertheless not proscribed by the Robinson-Patman Act because television time is not a "commodity". CBS argues that a "commodity", as that term is used in Section 2(a) of the statute, refers only to tangibles and does not, therefore, include the broadcast time sold by the networks to their customers, the sponsors of its programs.

The issue of whether the applicability of the Robinson-Patman Act is dependent upon the distinction between tangibles and intangibles is one of extreme importance under the Federal anti-trust laws. The question is purely one of statutory construction and is important, not only from the standpoint of resolving a fundamental ambiguity, but from the standpoint of the efficacy of our anti-trust statutes. Moreover, the "commodity" issue involves the underlying philosophy of the price discrimination statute—the principle of equal treatment of customers competing in the market place. The duty of construing legislation in keeping with its basic purposes is, of course, incumbent upon the courts, and when the statute in question is one of the most important laws governing the nation's economic system, the ambiguity should, and must, ultimately, be resolved by this Court.

But the importance of this "commodity" question is not limited to underlying anti-trust philosophy and the efficacy of our laws governing competition. Its importance stems also from the far-reaching consequences—the "precedential value"—of a final decision as to the meaning of the statute. Although the instant case is obviously a matter of great concern to Amana (the amount of the discrimination between Amana and its competitors being approximately $225,000.00), Amana is but one of a great many

companies that have purchased and will purchase television time under the sharply graduated quantity discount schedule of the networks. On oral argument before the Court of Appeals, counsel for CBS alluded to the "floodgates" of litigation that would be opened by a decision in favor of Amana. While the accuracy of this statement is a matter of conjecture, it clearly demonstrates that this question is one of utmost importance to the radio and television networks, and also to those claimants who would gain access through such "floodgates" to the recoveries that would undo the damage they incurred as a result of such discrimination.

However important to the radio and television industry, this "commodity" question is of even greater importance to the newspaper and publishing industry. The legal question under the Robinson-Patman Act is the same whether advertising space or television time is involved, and selling newspaper and magazine space on a quantity discount basis is common practice.

The problem, moreover, is not limited to price discrimination but extends to such practices as tie-in sales, requirements contracts and other exclusive dealing devices proscribed by Section 3 of the Clayton Act (15 U.S.C. § 14), for the term "commodity" appears in that Section as well as Section 2(a). If advertising space and television time are not "commodities", then the various media of communication may engage in price discrimination, tie-in selling, and exclusive dealing practices with complete immunity from the prohibitions of the Clayton and Robinson-Patman Acts.

Most of the current cases involving the "commodity" issue have been brought under Section 3 of the Clayton Act. Following the consent decree entered in *U. S.* v.

Wichita Eagle Publishing Co., Inc., C.C.H., 1959 Trade Cases, Par. 69,400 (D. Kansas, 1959), a competing newspaper brought suit against that defendant in the same court alleging the same violation. *Beacon Newspaper Corporation, Inc.* v. *Wichita Eagle Publishing Co., Inc.*, Civil Action No. W-1937. The district court in the case brought by the government enjoined tie-in sales of advertising, and the decree stated that the complaint stated a claim for relief under the Clayton Act as well as the Sherman Act, a legal conclusion which could be true only if advertising were a "commodity". The issue of whether advertising is a "commodity" under Section 3 of the Clayton Act has been specifically raised in the treble damage case on the defendant's motion to dismiss the complaint. This motion is now pending before that court.

The same issue was raised in *News, Inc.* v. *Lindsay Newspapers, Inc.*, et al, Civil Action No. 3478, a case now pending in the District Court for the Southern District of Florida, Tampa Division. The defendant's motion to dismiss was predicated, in part, on the non-applicability of the Clayton Act to sales of advertising space. The defendant's motion was denied but the court did not write an opinion.

In *Scott Publishing Co., Inc.* v. *Columbia Basin Publishers, Inc.*, et al, C.C.H., 1959 Trade Cases, Par. 69,589, (W.D. Wash., 1959) the court made no holding on this question but, on the last page of its opinion, expressed doubt as to whether advertising space was a "commodity":

> "While there is considerable doubt in the Court's mind whether newspaper advertising is a 'commodity' within the meaning of the Robinson-Patman Act, or 'goods, wares, merchandise, or other commodity' within the meaning of the Clayton Act, decision of that question is unnecessary in this case in view of the Court's find-

> ing that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessening competition or tended to create a monopoly or injure, destroy or prevent competition; and that there were no sales of advertising, or prices fixed for advertising, upon any agreement or understanding that the purchaser would not advertise in the Tri-City Herald."

One can predict with certainty that this "commodity" question will be raised with increasing frequency in the various Federal courts of the country until it is finally resolved by this Court. An early adjudication of the issue would, therefore, enhance the efficient and orderly administration of justice in such anti-trust litigation.

The importance of this anti-trust issue from the standpoint of judicial administration is underscored by the fact that the decision of this Court in *Times Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594, 73 S. Ct. 872 (1953) was relied on by the plaintiffs in both the *News, Inc.* and *Wichita Beacon* cases in support of their position that tie-in selling of advertising space was proscribed by the Clayton Act. Amana, too, in its brief before the Court of Appeals, contended that an analysis of that decision led to the conclusion that this Court was of the opinion that advertising space was a "commodity". It is clear, however, that this Court did not expressly rule on that issue in *Times-Picayune*, a fact alluded to by the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2nd. Cir. 1956):

> "The correctness of the dismissal of this cause of action raises, however, important and *apparently unresolved questions under the Clayton Act*. Thus the Supreme Court reserved in the *Times-Picayune* case the question whether advertising space is a 'commodity' within the meaning of Section 2 of the Act. See 345 U.S. at page 610, note 27, and cases cited." (236 F. 2nd at 527; emphasis added.)

The question of whether discriminatory sales of *radio* broadcast time are prohibited by the *Robinson-Patman* Act amendment to the Clayton Act is now pending in the *Syracuse* case.

The "commodity" issue was not a necessary element of the *Times-Picayune* decision. It is essential to the case at bar and must ultimately be decided. Amana's Petition presents this Court with an opportunity to decide conclusively the question "reserved" in *Times-Picayune*, so that the Federal courts, as well as the many advertiser and media litigants, present and potential, can be apprised of the law and guide themselves accordingly.

For all of the reasons stated above, the "commodity" issue is one of the most important unanswered issues under the Federal anti-trust laws today and should, therefore, be decided now by this Court.

CONCLUSION

For each of the foregoing reasons, we earnestly urge that this Petition be granted and that this Court's writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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Dated February 12, 1960